Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1547

AUDREY ELIZABETH NORRIS,
Petitioner,

vs.

CHARLES BAIRD NORRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MOLINARI, CASALNUOVO & BERGER,
A PROFESSIONAL CORPORATION,
LEONARD B. BERGER,
595 Golden Gate Avenue
San Francisco, California 94102
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Page

Statement of case 1

Argument 2

I.

Mrs. Norris was not deprived of due process of law at the first hearing 2

II.

The Civil Service retirement annuity was properly valued 3

Conclusion 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1547

AUDREY ELIZABETH NORRIS,
Petitioner,

VS.

CHARLES BAIRD NORRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF CASE

This case involves a marital dissolution proceeding instituted in California by respondent Charles Baird Norris. The uncontradicted evidence in the case indicated that respondent was permanently transferred to and was a resident of California at the time of these proceedings. There were two hearings; the first dealt with the dissolution of the marriage because of irreconcilable differences of the parties; the second dealt with the issues of property, support and counsel fees.

ARGUMENT

I.

MRS. NORRIS WAS NOT DEPRIVED OF DUE PROCESS OF LAW AT THE FIRST HEARING

Mrs. Norris was not deprived of any constitutional rights in the hearing on the issue of the dissolution of the marriage (the later hearing dealing with the property of the parties and support were participated in by petitioner and counsel).

Mrs. Norris entered a general appearance in this matter and was actively represented by counsel throughout these proceedings. Mrs. Norris had filed a petition for reconciliation which can, at best, be regarded as frivolous in which she refers to the care and custody of her 9 dogs.

The argument presented herein by petitioner was rejected by the California Court of Appeal (see Appendix A) which stated inter alia:

> "We have also concluded that the trial court did not abuse its discretion in refusing appellant a continuance despite the fact that she had substantiated the fact that she was unable physically to come to California for the dissolution hearing. The trial court in exercising its discretion was entitled to take into consideration whether the rights of Mr. Norris would be jeopardized by a continuance (*City of San Diego v. Walton* (1947) 80 Cal. App. 2d 206, 213) and whether Mrs. Norris had made a sufficient showing of the necessity of her appearance. (*Thorpe v. Thorpe* (1946) 75 Cal. App. 2d 605, 607; *In re Marriage of Brown* (1972) 27 Cal. App. 2d 188, 191.) Mr. Norris' employment status was dependent upon an early resolution of his marital problem; Mrs. Norris made no showing of what evidence she could give relevant to either the question of domicile or irreconcilable differences. Mere statements that her testimony would be essential and that she needed to be present to 'present evidence and testify as to important facts' is not a sufficiently specific showing in view of the earlier finding of the conciliation court that conciliation of the parties was not reasonably possible."

II.

THE CIVIL SERVICE RETIREMENT ANNUITY WAS PROPERLY VALUED

The court did not err in the valuation of Mr. Norris' civil service annuity at current vested account balance of over $18,000.00. The uncontradicted evidence showed that Mr. Norris would receive that amount if he terminated employment at the time of the trial. He had no immediate retirement rights other than to those amounts in his account since he had not reached even early retirement age.

Additionally, there was not even an offer of proof of the alleged actuarial value of this account (which would have to be premised on the condition that Norris would continue employment until a later date certain to qualify for early retirement) at the trial of this matter.

Parenthetically, Mrs. Norris' teacher's retirement annuity was valued in the same fashion as Mr. Nor-

ris' benefit. No fault was found with this portion of the judgment.

Petitioner completely misstates the court's finding in this case. The court awarded one-half (½) of Mr. Norris' *vested* pension to Mrs. Norris. The court, however, concluded that any other sums would be mere speculation. It was the vested portion that was distributed; there was no *expectancy* that could be *vested* since Norris had not met any of the conditions for retirement at the time of the dissolution.

CONCLUSION

The petitioner herein appeared in the California action. She retained able counsel who participated throughout the proceedings. There is no evidence that she was deprived of any substantive rights nor deprived at any stage of the various hearings of due process of law.

Dated, San Francisco, California,
June 30, 1975.

Respectfully submitted,

MOLINARI, CASALNUOVO & BERGER,
A PROFESSIONAL CORPORATION,
LEONARD B. BERGER,
Attorneys for Respondent.

(Appendix Follows)

APPENDIX

Appendix A

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION THREE

1 Civil No. 33,192
(Sup. Ct. No. 625 361)

In re Marriage of Charles Baird Norris and Audrey Elizabeth Norris
Charles Baird Norris, Respondent, vs. Audrey Elizabeth Norris, Appellant.

[Filed Jan. 17, 1975]

OPINION

Audrey Elizabeth Norris appeals from an interlocutory judgment ordering the dissolution of her marriage to Charles Baird Norris and establishing the community property rights of the respective parties. She challenges the jurisdiction of the court to dissolve the marriage on the ground that she is a resident of Ohio with no contacts with California and her

husband did not establish a bona fide domicile. This position must yield to the substantial evidence rule, as must her argument that there existed an executed oral antenuptial agreement. We have also concluded that the Family Law Act of 1970 is not unconstitutional as applied to the appellant, that the trial court did not abuse its discretion in denying her a continuance and that the court's division of pension rights must be upheld.

Relative to the contention that Mr. Norris did not establish a bona fide California residence and to Mrs. Norris' claim that she was entitled to the assets acquired during marriage by reason of the antenuptial oral agreement, there was a conflict in the evidence which was resolved by the trial court in favor of Mr. Norris.

The evidence disclosed that the parties were married in Washington, D.C., in 1947 and, a few years later, moved to Cincinnati where they resided until their separation in June of 1969. Both parties were gainfully employed during the marriage. Mrs. Norris was a school teacher, taught at the University of Cincinnati and obtained her Master's Degree. Mr. Norris was a lawyer employed by the Internal Revenue Service. Mr. Norris testified that the Internal Revenue Service assigned him to San Francisco at his request and that he intended to live in San Francisco. Prior to commencing divorce proceedings, Mr. Norris had resided in San Francisco for six months, fulfilling the requirements of section 4530(a) of the Civil Code. Mr. Norris denied that he had entered

into any oral agreement. On both the issue of residence and the existence of an agreement, this court must follow the substantial evidence rule and resolve all conflicts in the evidence in favor of the trial court's findings. (Cooper v. Cooper (1969) 269 Cal.App.2d 6, 8.)

We have also concluded that the trial court did not abuse its discretion in refusing appellant a continuance despite the fact that she had substantiated the fact that she was unable physically to come to California for the dissolution hearing. The trial court in exercising its discretion was entitled to take into consideration whether the rights of Mr. Norris would be jeopardized by a continuance (City of San Diego v. Walton (1947) 80 Cal.App.2d 206, 213) and whether Mrs. Norris had made a sufficient showing of the necessity of her appearance. (Thorpe v. Thorpe (1946) 75 Cal.App.2d 605, 607; In re Marriage of Brown (1972) 27 Cal.App.3d 188, 191.) Mr. Norris' employment status was dependent upon an early resolution of his marital problem; Mrs. Norris made no showing of what evidence she could give relevant to either the question of domicile or irreconcilable differences. Mere statements that her testimony would be essential and that she needed to be present to "present evidence and testify as to important facts" is not a sufficiently specific showing in view of the earlier finding of the conciliation court that conciliation of the parties was not reasonably possible.

It is argued that the nonresident respondent in a dissolution action cannot challenge *in personam* juris-

diction without making a general appearance. Here, Mrs. Norris made a general appearance by her response to the petition for dissolution. (Code Civ. Proc., § 1014; Family Law Rule, § 1236.) No reason appears why she could not have made a special appearance as provided by Code of Civil Procedure section 418.10 to challenge *in personam* jurisdiction over herself and a special appearance to contest subject matter jurisdiction over the marriage. (See Rest., Judgments, § 39; 1 Witkin, Cal. Procedure, Jurisdiction, § 167, pp. 696-697.)

We do not agree with appellant that Civil Code section 4803 is unconstitutional as applied here. The definition of quasi-community property was expanded in 1970 by an amendment of Civil Code section 4803 to include all real, as well as personal property wherever situated, rather than only real property situated in California. Appellant argues that this amendment should not be applied to real property acquired prior to the enactment of the amendment, relying on the theory of *Estate of Thornton* (1934) 1 Cal.2d 1. In *Thornton* the court held unconstitutional the application of a quasi-community property concept in a situation where the husband brought to California property acquired elsewhere in which his widow sought to establish community property rights upon his death. The underlying theory of *Thornton* has since been questioned and has been held inapplicable to the application of quasi-community property concepts in a divorce or separate maintenance action filed after domicile in California. (Addison v. Addi-

son (1965) 62 Cal.2d 558, 565-566; see 54 Cal.L.Rev. 252, *Marital Property and the Conflict of Laws: The Constitutionality of "Quasi-Community Property" Legislation.*) It is also noted that in this case, as in *Addison,* the judgment of dissolution was granted after the effective date of the legislation. (See 62 Cal. 2d at 569.) *Rozan v. Rozan* (1957) 49 Cal.2d 322, cited by appellant, is not authority on the question of the court's power over marital interests in out-of-state property since the case was decided before Civil Code section 146 (now Civil Code section 4800) was amended to cover quasi-community property.

Appellant's complaint that the California court could not indirectly affect title to real property in Ohio is not well taken. "It is well settled . . . that a court, with the parties before it, can compel the execution of a conveyance in the form required by the law of the situs and that such a conveyance will be recognized there. (Citations.)" (Rozan v. Rozan, supra, at p. 330.) Mrs. Norris was before the court as was Mr. Norris. Having made a general appearance without specially challenging *in personam* jurisdiction, she may not now complaint of a lack of a constitutional basis for jurisdiction. (See McCorkle v. City of Los Angeles (1969) 70 Cal.2d 252, 257-258.)

Appellant objects to the application of California law to dissolve a marriage which took place in another state. Her objections again, however, center upon considerations appropriate to the Legislature. For example, she points to the possibility of encour-

aging forum shopping; she emphasizes the unfairness which may result to an innocent spouse in a no-fault divorce; she argues that no-fault divorce is an impairment of the obligation of contracts.

It is a recognized principle that the local law of the jurisdiction in which the action is brought will be applied to determine the right to divorce. (Rest. 2d Conflict of Laws, § 285; see Williams v. North Carolina (1942) 317 U.S. 287, 298-299.) The Family Law Act has been upheld again an attack on its constitutionality. (In re Marriage of Cosgrove (1972) 27 Cal. App.3d 424, 429.) In *Cosgrove,* the court pointed out that: "The guidelines for the proof and determination of the existence of 'irreconcilable differences' are no more lacking in the present law than were the guidelines for the determination of fault under the former law. The rights of the responding party who elects to oppose the dissolution of the marriage are fully protected. The procedures prescribed for exhausting all reasonable efforts to save the marriage by reconciliation demonstrate the continuing concern of the law for the preservation of the marriage wherever possible." Appellant seeks to distinguish this case from *Cosgrove* by pointing out that the appellant in *Cosgrove* did not deny the existence of irreconcilable differences in her response to the petition. The court in *Cosgrove* noted this fact in pointing out that the appellant did not contend that any available reconciliation procedures had not been utilized. Here, too, the appellant did not so contend and, in fact, availed herself of the procedures of the conciliation court.

Mrs. Norris' final contention is that the trial court erred in the valuation of their respective pension rights.

Mr. Norris' pension rights in the Civil Service Retirement System were valued at $18,831.00 and Mrs. Norris' rights in the Ohio Teachers Retirement System were valued at $11,570.00 Both figures represented the amount the parties would receive were they to leave their employment at the time of valuation. Neither party had retired or reached the age when they were eligible to retire. At the trial, Mrs. Norris took the position that Mr. Norris had a right to retire at that time and receive a disability pension but this was denied by Mr. Norris who testified that he did not have the right to a pension unless he completed further time.

"The law is settled in California that retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved. (Citations.)" (In re Marriage of Fithian (1974) 10 Cal.3d 592, 596.) The court in *Fithian* noted that "The right to retirement benefits 'vests' when an employee acquires an irrevocable interest in a fund created by his own contributions and/or the contributions of his employer. The 'vesting' of retirement benefits must be distinguished from the 'maturing' of those benefits, which occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of the employee. (Citations.)" (10 Cal.3d 596, fn.1)

The only portion of Mr. Norris' pension rights which had vested was the amount of $18,831.00 since, according to the testimony, the right to the pension, rather than just the payment of the pension, had to await the age of 55. The court, therefore, did not err in refusing to value the pension on an actuarial basis.

The rule that pension benefits which have not yet vested are a mere expectancy and not subject to division as community property was articulated in *French v. French* (1941) 17 Cal.2d 775, 777. The Supreme Court in *In re Marriage of Wilson* (1974) 10 Cal.3d 851, 853, announced that it had granted a hearing in that case in order to ascertain the current viability of the *French* rule. The court declined to do so, however, because the record revealed that the respondent wife expressly acquiesced in the *French* rule at the trial level and had not appealed from that portion of the judgment adverse to her interests. The rule of *French v. French* thus remains and controls this case.

The judgment is affirmed.

Brown (H. C.), J.

We concur:

Draper, P. J.

Good, J.*

*Retired Judge of the Superior Court, assigned by the Chairman of Judicial Council.